

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Joseph Caesar Bartulio,

Defendant-Appellant.

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UNPUBLISHED

May 29, 2012

No. 303284

Wayne Circuit Court

LC No. 10-009666-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of armed robbery, MCL 750.529. Defendant was sentenced to 9 to 20 years' imprisonment for the armed robbery conviction. For the reasons set forth in this opinion, we affirm.

This case arises out of an incident that occurred on August 18, 2010, when Robert Richards, a cab driver, picked up a white male, approximately 5'10" tall, near the R & R Bar in Detroit. The man was wearing blue shorts with a silver stripe, and he was Richards's last fare and passenger. The man requested that Richards take him to "75 and Six Mile." During the drive, Richards and the man engaged in conversation. According to Richards, he spoke with the passenger for approximately 15 to 20 minutes, and Richards got "a good look at [the passenger's] face."

During their conversation, the passenger repeatedly asked Richards to borrow \$20, but Richards refused to lend any money. At some point, the passenger requested that Richards pull over at Robinwood Road. Richards obliged and pulled his cab over to the side of the road. As he exited the cab, the passenger told Richards that he would be "right back." Because Richards received a \$20 deposit from the passenger when he first got into the cab; Richards was not concerned about the fare or the passenger returning. Shortly after, the passenger returned to the cab and requested that Richards drive him to his house. Richards told him that "his deposit had run and that he needed to give [Richards] more of a deposit to go further." The passenger responded, "I'll be back," and he walked away again. Subsequently, a person opened the back door of the cab and climbed inside. Richards "looked at [the person] like [sic] out of the corner of [his] eye." Richards did not observe the person's face; however, he noticed that the person who got into the cab wore blue shorts with a silver stripe. The shorts were the same blue shorts the passenger he was waiting for, i.e., the man he picked up near the R & R Bar, was wearing.

Richards then felt an object placed against his head. Richards did not see the object. The person then said, "Give me the money." Richards feared for his life and gave the person all the money he had, approximately \$123. The person then got out of the cab and took off running. According to Richards, he recognized the voice of the person. It was the same voice of the passenger he picked up near the R & R Bar who was wearing blue shorts with a silver stripe.

After the robber ran away, Richards got out and walked around the cab to close the passenger side door that was left open by the robber. Richards noticed an identification card lying on the passenger side floorboard of the cab, which depicted the same person who had just robbed him, the same passenger Richards picked up near the R & R Bar. The identification card belonged to defendant.

On January 11, 2011, the trial court held a bench trial, and following the testimony of Richards and Officer Boyle, the trial court made its findings of fact and conclusions of law, finding defendant guilty of armed robbery. On February 7, 2011, defendant was sentenced to 9 to 20 years' imprisonment.

On August 18, 2011, defendant's appellate counsel filed a motion for a new trial. Defendant's appellate counsel argued that defendant has a history of failing to pay cab drivers and was convicted of larceny by conversion.<sup>1</sup> She argued that, pursuant to MRE 404(b), defendant's trial counsel should have introduced evidence of defendant's prior offenses to show that defendant employed a scheme, plan, or system of not paying cab drivers. Defendant's appellate counsel contended that defendant's trial counsel's failure to introduce this evidence resulted in the ineffective assistance of counsel. On September 23, 2011, the trial court heard oral arguments on defendant's motion for a new trial. The trial court denied defendant's motion for a new trial. The trial court held, "The Court isn't convinced that this merits any further action in regards to a new trial and will deny the motion for a new trial respectively." This appeal ensued.

Defendant first argues that the prosecution failed to present sufficient evidence to prove, beyond a reasonable doubt, that he was the perpetrator of the crime.

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

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<sup>1</sup> In an affidavit attached to the motion for a new trial, defendant stated:

I have a history of failing to pay cab drivers. This is what happened in the case herein. I failed to pay a cab driver in Hazel Park in 1999; in Sterling Heights in 1999; in Chesterfield Township in 2002; in 2004 in Hazel Park, in Fraser in 2004; in Oakland County in 2005; and Chesterfield Township in 2009. I was charged for these offenses.

Identity of the defendant is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Generally, a positive identification by a witness may be sufficient to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, the credibility of identification witnesses is within the purview of the fact finder, and will not be “resolve[d] anew” on appeal. *Id.*

The prosecutor presented sufficient evidence that defendant was the perpetrator of the crime. Robert Richards identified defendant as the perpetrator, by both his clothing and his voice. The man was wearing blue shorts with a silver stripe, and Richards engaged in a lengthy conversation with the man. Richards “looked at [the person] . . . out of the corner of [his] eye.” Richards did not observe the person’s face; however, he noticed that the person wore blue shorts with a silver stripe. The blue shorts were the same blue shorts that the male passenger he was waiting for was wearing.

The person then said, “Give me the money.” According to Richards, he recognized the voice of the robber. It was the same voice as the male passenger that was wearing the blue shorts with the silver stripe. Richards identified the perpetrator’s voice as belonging to the same man he was waiting for. Subsequently, Richards found defendant’s identification card in the cab. The identification card belonged to the last passenger in his cab. According to Richards, the identification card depicted the male passenger that was wearing blue shorts with a silver stripe, i.e., the man that robbed him. In fact, two days after the robbery, Richards told Detroit Police Officer Tom Boyle that “he was one hundred percent sure that the person in the ID was the one that robbed him.” At trial, Richards asserted that he was certain that the man depicted on the identification card was the same man who was last in his cab and that man was the one who robbed him. This testimony, viewed in the light most favorable to the prosecution, was sufficient to establish, beyond a reasonable doubt, that defendant was the perpetrator of the crime.

Defendant also argues that the trial court abused its discretion when it denied his motion for a new trial on the ground that he was denied the effective assistance of counsel.

This Court reviews a trial court’s decision to grant a new trial for abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Further, whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). When reviewing claims of ineffective assistance of counsel this Court reviews the trial court’s factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant preserved the claim of ineffective assistance of counsel by moving for a new trial; however, because the trial court denied defendant’s motion, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The trial court did not abuse its discretion in denying defendant’s motion for a new trial because defendant failed to establish a claim of ineffective assistance of counsel. Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval (On Remand)*, 282 Mich

App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that evidence of his prior offenses, i.e., larceny by conversion, should have been presented at trial to show that he engaged in a scheme or plan of failing to pay his cab fares. He contends the evidence would have supported a defense that no robbery occurred and that Richards fabricated the incident because he was angry that defendant failed to pay the cab fare. The failure to present evidence constitutes ineffective assistance of counsel only where it deprives a defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which would have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant's trial counsel's failure to present evidence of defendant's prior offenses did not deprive defendant of a substantial defense. The defense theory was that Richards was mistaken and that defendant never returned to the cab. Defendant's trial counsel vigorously cross-examined Richards and sought to bolster the defense theory by attacking Richards's credibility and perceptions on the day of the incident. The trial court found Richards credible. The trial judge stated, "And the Court believes that certainly this wasn't an issue of credibility as it relates to whether this cab driver was lying or not. Certainly, there wasn't a lie . . . . [I]f this cab driver was going to lie or embellish he certainly could have done a much better job than he's done." Given the trial court's findings, a defense theory seeking to establish that Richards fabricated the incident would not have made a difference in the outcome of the trial. Defendant's trial counsel offered the defense of mistaken identity through his cross-examination of Richards and bolstered that defense in his opening statement and closing argument; therefore, defendant was not deprived a substantial defense.

Moreover, the decision to pursue a particular defense theory is a matter of trial strategy. *LaVearn*, 448 Mich at 216. Defendant has failed to overcome the presumption that trial counsel's decision to pursue the defense of mistaken identity constituted reasonable trial strategy. Still, defendant contends that his trial counsel was ineffective because he should have introduced evidence of his larceny by conversion convictions. It was likely that defendant's trial counsel did not introduce evidence of defendant's prior offenses as a matter of trial strategy. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398-399; 688 NW2d 308 (2004). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has failed to provide any facts demonstrating that trial counsel's decision was not sound trial strategy. Given the circumstances in this case, defendant's trial counsel could have reasonably determined that introducing evidence of defendant's prior offenses would have been injurious to defendant's

case. That is, evidence that defendant engaged in a practice of repeatedly failing to pay cab drivers would have surely cast defendant in negative light.

In sum, defendant has failed to show that trial counsel's decision was not founded on considerations of reasonable professional judgment, and thus, he has failed to establish that trial counsel's performance fell below an objective standard of reasonableness or would have resulted in a different outcome. Accordingly, defendant has not shown any error on the record, and the trial court correctly denied his motion for a new trial.

Affirmed.

/s/ Amy Ronayne Krause  
/s/ Henry William Saad  
/s/ Stephen L. Borrello